

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
SAN FRANCISCO BRANCH OFFICE  
DIVISION OF JUDGES

**USC UNIVERSITY HOSPITAL**

**and**

**Cases 21-CA-39656  
21-CA-39693  
21-CA-39798  
21-CA-39799  
21-CA-39808  
21-CA-39870**

**NATIONAL UNION OF HEALTHCARE  
WORKERS**

*Jean C. Libby, Esq., and Lindsay R. Parker, Esq.,*  
Los Angeles, CA, for the General Counsel.  
*Linda Van Winkle Deacon, Esq., and Lester F. Aponte,*  
*Esq.,* Los Angeles, CA, for the Respondent.

**DECISION**

**Statement of the Case**

**Gregory Z. Meyerson, Administrative Law Judge.** Pursuant to notice, I heard this case in Los Angeles, California, on October 24-28 and December 6, 2011. This case was tried following the issuance of an Order Consolidating Cases, Consolidated Amended Complaint and Amended Notice of Hearing (the complaint) by the Acting Regional Director for Region 21 of the National Labor Relations Board (the Board) on July 29, 2011. The complaint was based on a number of unfair labor practice charges, as captioned above, filed by the National Union of Healthcare Workers (the Union, the NUHW, or the Charging Party).<sup>1</sup> It alleges that USC University Hospital (the Respondent, the Employer, or the Hospital) violated Sections 8(a)(1), (3), and (5) of the National Labor Relations Act. The Respondent filed a timely answer to the complaint denying the commission of the alleged unfair labor practices.

Counsel for the General Counsel and counsel for the Respondent appeared at the hearing, and I provided them with the full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to argue orally and file briefs. Based on the record, my consideration of the briefs filed by counsel for the General Counsel and counsel for the Respondent, and my observation of the demeanor of the witnesses,<sup>2</sup> I now

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<sup>1</sup> G.C. Ex. 1(a) through 1(ap), the "Formal Papers," establish the filing and service of the enumerated charges as alleged in the complaint.

<sup>2</sup> The credibility resolutions made in this decision are based on a review of the testimonial record and exhibits, with consideration given for reasonable probability and the demeanor of the witnesses. See *NLRB v. Walton Manufacturing Company*, 369 U.S. 404, 408 (1962). Where witnesses have testified in contradiction to the findings herein, I have discredited their testimony, as either being in conflict with credited documentary or testimonial evidence, or because it was inherently incredible and unworthy of belief.

make the following findings of fact and conclusions of law.

## Findings of Fact

### 5 I. Jurisdiction

10 The complaint alleges, the answer admits, and I find that since April 1, 2009, the Respondent, a California corporation with a hospital facility (“the facility”) located at 1500 San Pablo Street, Los Angeles, California, has been engaged in business as an acute-care hospital. Further, I find that during the 12-month period ending March 16, 2011, the Respondent, in conducting its business operations as just described, derived gross revenues in excess of \$250,000; and during the same period of time, also purchased and received at its hospital facility goods valued in excess of \$50,000 directly from points outside the State of California.

15 Accordingly, I conclude that the Respondent is now, and at all times material herein has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

### 20 II. Labor Organizations

The complaint alleges, the answer admits, and I find that at all times material herein, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

25 The complaint alleges, the answer admits, and I find that at all times material herein, Service Employees International Union, United Healthcare Workers-West (“SEIU”) has been a labor organization within the meaning of Section 2(5) of the Act.

## III. Alleged Unfair Labor Practices

### 30 A. Background Facts

35 The Respondent is a general acute-care hospital. It purchased the facility from Tenet Healthcare Corporation (“Tenet”) on about April 1, 2009. At that time, there was in effect a collective bargaining agreement between Tenet and the Service Employees International Union, United Healthcare Workers-West (“SEIU”) with respect to a unit (“the Unit”) of service, maintenance, and technical employees. The Unit was previously found by the Board to constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.<sup>3</sup> The collective bargaining agreement in effect at the time of the purchase was, by its terms, effective from January 1, 2007, to March 31, 2011. (G.C. Ex. 4.)

40 The Respondent agreed to recognize the SEIU as the exclusive bargaining representative of the employees in the Unit and to adopt the terms of the collective bargaining agreement between Tenet and the SEIU, to the extent that such terms were not unique to Tenet. Subsequently, the SEIU disclaimed interest in representing the employees in the Unit, and as of June 17, 2010, the NUHW became the certified bargaining representative of the

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<sup>3</sup> This Unit includes: All full time, regular part-time and per diem service, maintenance, technical and skilled maintenance employees employed by the Hospital at its facility located at 1500 San Pablo Street, Los Angeles, California; excluding all other employees, guards, physicians, residents, central business office employees (whether facility-based or not) who are solely engaged in qualifying or collection activities, employees of outside registries and other agencies supplying labor to the Hospital and already-represented employees.

employees in the Unit. It is undisputed that since that date, based on Section 9(a) of the Act, the NUHW has been the exclusive collective bargaining representative of the employees in the Unit. There are approximately 600 employees in the Unit. Negotiations between the NUHW and the Respondent for a successor collective bargaining agreement began in August of 2010, but to date have not resulted in a new agreement.

## B. The Dispute

The complaint alleges five separate and fairly distinct areas where the General Counsel contends that the Respondent's conduct has violated the Act. Area one involves the pulmonary function technicians ("the PFTs"), who are a specialized group of respiratory therapists employed by the Respondent to work in a specific laboratory performing pulmonary function tests. The PFTs perform blood gas studies on patients prior to the performance of emergency procedures in the operating room. Paragraphs 10, 11, 18, and 19 of the complaint allege that the Respondent violated the Act by unilaterally changing the method by which the PFTs were customarily paid for "on-call" and "extra shift bonus" work. The Respondent denies that it changed any contractual or past practice for payments to the PFTs, and contends that this dispute over pay was simply the result of one supervisor mistakenly authorizing excessive payments for a small number of employees who work in the Pulmonary Services Department. Further, paragraphs 12, 13, 18, and 19 of the complaint allege that the Respondent violated the Act by unilaterally eliminating the mandatory blood gas lab on-call schedule. However, the Respondent denies that its action constituted an unlawful unilateral change, and contends that its action was necessitated by the PFTs' refusal to work a mandatory blood gas lab on-call schedule.

The second area of dispute involves the echo technicians who work in the Cardiology Department and take ultrasound images of the patients' hearts. Paragraphs 14, 18, and 19 of the complaint allege that the Respondent unilaterally changed the work schedule of the echo technicians from a 3 day, 12-hour schedule to a 5 day, 8-hour schedule. The Respondent acknowledges making the change, but contends that it did so lawfully, as it had the authority to make the change under the terms of the parties' collective bargaining agreement.

The parties third area of dispute is reflected in paragraph 15 of the complaint, as amended by G.C. Ex. 2, and paragraphs 18 and 19 where the General Counsel alleges that the Respondent unilaterally discontinued its 7-minute grace period policy for employees in the Respiratory, EVS, and Pulmonary Services/Laboratory Departments. Further, the General Counsel contends that following the Respondent's unlawful unilateral change, it issued discipline to 3 employees for being late to work, even though they arrived for their work shifts within the 7 minute grace period. The Respondent denies that any such grace period policy existed, and it contends that the employees in question were properly disciplined for arriving late for work.

Paragraphs 16, 18, 19, and 21 of the complaint involve the fourth area of dispute. The General Counsel alleges in these paragraphs of the complaint that the Respondent's policy had been to allow employees to wear union insignia while working in the hospital, even in immediate patient care areas. However, the General Counsel contends that the Respondent unilaterally began instructing employees to remove a particular union sticker that read, "Respect Our Work Stop Union Busting! We Support William Hooper NUHW." While the Respondent admits instructing one employee to remove the sticker in question, it justifies this action as a legitimate exception to its general policy since the sticker in question contained inflammatory content, which when worn in patient care areas had the potential to upset those patients who observed it.

Finally, the fifth area of dispute involves the disciplining of employee Juan Michael Torres. It is alleged in paragraphs 17 and 20 of the complaint that the Respondent issued warnings to Torres and ultimately suspended him for 24 hours because of his union and protected concerted activities. The Respondent denies that Torres' protected conduct had anything to do with his discipline and suspension. Rather, the Respondent contends that Torres was disciplined and suspended because he was repeatedly absent from work without an approved excuse and because of tardiness.

#### IV. Analysis and Conclusions

##### A. The Extra Shift Bonus and On Call Issue

Preliminary, I will note that what has been referred to in the complaint, during the trial, and in the parties' post-hearing briefs as the "extra shift bonus" and/or the "on call" issue is very confusing. The various witnesses who testified, both employees and managers, had considerable difficulty explaining these terms as found in the collective bargaining agreement and as utilized through past practice. Also, I found it difficult to understand counsel for the General Counsel theory of the case as alleged in complaint paragraphs 10 through 13, those paragraphs of the complaint involving the extra shift bonus and on call issue. In retrospect, for the most part, this confusion is the result of the evidence of record not entirely supporting the allegations and terminology as set forth in the complaint. In an effort to try and clarify the language in the complaint and conform it to the testimony of various witnesses, as the trial ended, counsel for the General Counsel moved to amend those paragraphs of the complaint dealing with the extra shift bonus and on call issue. However, counsel for the Respondent strongly objected to the proposed amendment being offered literally as the trial concluded, indicating that it would prejudice the Respondent, whose defense had been based on the existing language in the complaint. In view of the potentially serious due process issue, I sustained the objection, and denied counsel for the General Counsel's motion to amend the complaint as proposed. Therefore, the undersigned is left to address these issues as set forth in the complaint.

The Hospital's Respiratory Therapy Department and Pulmonary Diagnostic Services Department are overseen by Director of Respiratory Therapy and Pulmonary Diagnostic Services, George Sarkissian. Although Sarkissian oversees both of these departments, each of the departments is directly supervised by separate managers. The Respiratory Therapy Department is directly managed by Department Manager of Respiratory Services Tracy O'Connell and the Pulmonary Diagnostic Services Department is directly managed by Susan Farr. It should be noted that during the trial, counsel for the Respondent had indicated her intention of calling Farr to testify. However, late in the trial counsel indicated that Farr would not be appearing. Counsel produced a letter, not offered into evidence, from a person purporting to be Farr's doctor, indicating that because of certain health concerns, he had advised Farr not to testify, as the stress of doing so might be detrimental to her health.

There are four pulmonary function therapists (PFTs)<sup>4</sup> employed at the Hospital and one OR blood gas technician. Basil Nasir is the only OR blood gas technician employed at the Hospital. The pulmonary function therapists and the OR blood gas technician are all part of the Pulmonary Diagnostic Services Department. The Pulmonary Diagnostic Service employees are a specially trained group of respiratory therapists that unlike the other respiratory therapists are stationed in the pulmonary lab and the operating room and perform specialized diagnostic tests.

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<sup>4</sup> These therapists include: Darren May, Roxanna Medrano, Ruben Duran, and Chris Bogg (who recently replaced therapist Lisa Rogers).

While the Respiratory Therapy Department operates 24 hours a day, 365 days a year, the Pulmonary Diagnostic Services Department is only open Monday through Friday from approximately 7:00 a.m. to 7:30 p.m. The Respiratory Therapy Department is much larger than the Pulmonary Diagnostic Services Department, in that it employs approximately 93 respiratory therapists.

The pulmonary function technicians perform a variety of tests to help evaluate a patient's lung function, tests that doctors then use to diagnose diseases. Because there is often a need for emergency surgeries and procedures to be performed in the operating room around the clock, since at least 2004 or 2005, the Hospital had utilized an "on call" schedule to cover the needs of the blood gas lab. The pulmonary function technicians and OR blood gas technician were placed on the "on call schedule" by Pulmonary Diagnostic Services Manager Farr in order to cover the blood gas lab's needs in the OR in the evenings and on the weekends, when the pulmonary function technicians were not regularly assigned to work. Farr would post monthly schedules 2 weeks in advance of the month that needed coverage and the pulmonary function technicians and OR blood gas technician would be assigned to be on call one evening per week and one weekend per month. Weekend coverage was from 7:00 p.m. on Friday through 7:00 a.m. on Monday. (G.C. Ex. 48.) Placement on this on call schedule was mandatory. The testimony of Basil Nasir, OR blood gas technician, and Darren May, pulmonary function technician, as to the use of the on call schedule was un rebutted and is undisputed. However, the manner in which employees were paid for actually being called back to work from the on call list is very much in dispute.

Pursuant to the collective bargaining agreement and past practice, the pulmonary diagnostic service employees were paid a rate of \$5.75 per hour for simply being placed on the on call schedule, regardless of whether or not they were called into work. (G.C. Ex. 4, pp. 56-57.) Further, when pulmonary diagnostic service employees on the on call schedule were needed to assist with a procedure in the operating room and were called into work for an evening or weekend shift, they would be paid at a rate of time-and-a-half of their base rate for the hours they were required to work. (G.C. Ex. 4, pp. 56-57.) Again, from the un rebutted testimony of the various witnesses and an examination of the contract, this is not in dispute.

However, what is very much in dispute is whether the pulmonary diagnostic service employees were entitled to any additional payments. According to the General Counsel's post-hearing brief, "[p]ursuant to Agreement, pulmonary diagnostic services employees are entitled to an extra shift bonus of \$125 when they have worked all the hours posted in their schedule and then work an additional 12-hour shift on top of his/her regular full time hours. Any additional hours worked beyond the additional 12-hour extra shift would be pro-rated at a rate of approximately \$10.42 per hour (\$125.00 divided by 12 hours)." In support of this position, counsel for the General Counsel cites to the contract, page 52 (G.C. Ex. 4.), and the testimony of employee Darren May. In any event, I find the General Counsel's contention very difficult to follow.

Counsel for the General Counsel acknowledges that the contract, under the heading "Extra Shift Bonus," page 52 (G.C. Ex. 4.), actually says that the bonus will be paid to unit employees "when they sign up to work an extra shift(s)." However, based on the testimony of a number of pulmonary function technicians including Darren May and OR blood gas technician Basil Nasir, the General Counsel contends in her post-hearing brief that manager Susan Farr had a "past practice" since 2004 or 2005 of paying the extra shift bonus to the pulmonary diagnostic employees "when they were *called into the Hospital from the mandatory on call OR blood gas lab schedule* in order to work an evening or weekend shift." (emphasis added by the undersigned) Thus, counsel contends that despite the language of the contract, which plainly states that employees must sign up to work an extra shift in order to be paid the bonus for

working that shift, that based on “past practice” pulmonary function technicians were paid the bonus for working the extra shift when called to work that shift from the mandatory on call schedule, which was non-voluntary. Counsel seems to be claiming that a bonus designed to be paid to employees who *voluntarily* agreed to work an extra shift was expanded by Susan Farr to include the payment of the bonus to pulmonary function technicians who had been *required* to sign the mandatory on call schedule from which they were called in to work the extra shift. Of course, the Respondent disagrees, arguing that any such payments authorized by Farr were simply an overpayment to the employees and a mistake.

The Respondent’s Chief Human Resources Officer, Matthew McElrath, testified that in August of 2010, the Hospital’s timekeeping and payroll system, known as “Kronos,” underwent a major upgrade, which became operational around October 1, 2010. Following that upgrade, Susan Farr had difficulty programming her old timekeeping system into the new Kronos system. After an investigation, it was determined that the problem was created when Farr attempted to pay the extra shift bonuses specifically for pulmonary function technicians who had been on the mandatory on call schedule and who had been called back to work in the OR blood gas lab. McElrath testified that after he became apprised of the problem, he directed Human Resource Manager Eva Herberger to correct the situation by directing Farr to comply with the contract, and to not pay the PFTs the extra shift bonus, for which they were not contractually entitled, after being called back to work from the mandatory on call schedule.

George Sarkissian, Administrative Director Respiratory and Pulmonary Diagnostic Services, testified that it was always his understanding that the contract provided for an extra shift bonus to be paid only for those employees who volunteered to work extra shifts, in order to encourage them to do so. It was his understanding that the extra shift bonus was not intended to pay employees who were on the mandatory on call list and were called back to work an extra shift. Such employees were paid an on call fee (\$5.75 per hour while on call for PFTs), and then, if called back to work, were paid at overtime rates for any extra shifts. According to Sarkissian, there were only four to five employees in the entire Respiratory and Pulmonary Diagnostic Departments who had inadvertently been receiving this extra shift bonus when called back to work from the mandatory on call schedule. Those were the PFTs, including the OR blood gas technician, supervised by Farr. As noted earlier, there were a total of 93 respiratory therapists employed in the two departments overseen by Sarkissian.

On around October 1, 2010, the PFTs who worked extra shifts off of the mandatory on call schedule began to receive their paychecks and observed that they were no longer receiving the \$125 extra shift bonus. Of course, they still received the \$5.75 per hour while on call, and then, if called back to work, received overtime rates for any extra shifts they worked. PFT Darren May testified that he complained to Susan Farr who told him that she had been making a mistake by paying the PFTs the extra shift bonus on the hours employees were called back into work from the mandatory blood gas lab on call schedule. Basil Nasir also complained to Farr, who similarly told him that the PFTs would not be receiving the extra shift bonus as they had in the past because she had been making a mistake in paying them the bonus and had been coding it incorrectly.

May contacted Union Field Representative Antonio Orea and complained about not being paid the extra shift bonus. This was apparently the first notice that the Union received regarding the PFTs not receiving this pay. On October 12, 2010, Orea sent a letter to Human Resources Manager Herberger regarding the elimination of the extra shift bonus for call back hours worked and other issues. This letter read in relevant part as follows: “It has come to my attention that [the Hospital] has implemented the following changes without notifying the Union....You are now refusing to pay the extra shift bonus to the PFT Department which has been paid for many years...all the above changes are unilateral changes. The Union was never

notified about these changes. The Union demands that you cease and desist from implementing these changes immediately until the Union has had a chance to meet with you to negotiate over these changes. Please call me to set up a time to meet. We are prepared to meet on any day and time that works for you.” (G.C. Ex. 54.)

Orea testified that he met with the Respondent’s counsel, Linda Deacon, on October 22, 2010, to discuss the elimination of the extra shift bonus and other issues. He complained to Deacon that the elimination of the extra shift bonus was a unilateral change. Allegedly she told Orea that the way in which the extra shift bonus had been paid for call back hours worked at the OR blood gas lab from the on call schedule had been a mistake. Orea indicated that the parties needed to resolve this matter, and Deacon agreed to look into the issue further. Orea’s testimony went un rebutted as Deacon, who functioned as counsel for the Respondent in this proceeding, did not testify. In early November 2010, Sophia Mendoza replaced Orea as Union Field Representative. She learned about the extra shift bonus issues when the PFTs complained to her. As a result, on November 11, 2010, the Union filed a grievance over the elimination of the extra shift bonus. (G.C. Ex. 28.)

Regarding the contractual language, I agree with the analysis set forth in counsel for the Respondent’s post-hearing brief. As counsel points out preliminarily, the “extra shift bonus,” and the “on call/callback” provisions are completely different and mutually exclusive concepts under the Tenet-SEIU contract adopted by the Hospital and the NUHW. Articles 13.C.2.a and b, of that contract provide for the payment of an “extra shift bonus” or “ESB” to bargaining unit employees working in specified job classifications “when they sign up to work” and actually “work all hours” in a posted extra shift or partial shift schedule. (G.C. Ex. 4, p. 52.) For respiratory care practitioners, the ESB is \$125. (*Id.*) As testified to by George Sarkissian and Matthew McElrath, the ESB is designed to be an incentive for an employee to volunteer to work additional shifts in addition to the regular schedule. It is payable only when an employee has voluntarily signed up for a posted, designated, scheduled shift. By definition, it applies in situations where the need for additional hours was anticipated. (*Id.*)

According to McElrath, for an unplanned situation, an employee who is on “standby” or “on call” status can be called in to work. It is uncontested, as testified to by both PFTs and managers, that on call status is assigned by management and the employee does not have the option to agree or decline to be assigned to on call status or to agree or decline to come in to work when “called back.” This is unlike an extra shift, which is voluntary. Thus, an ESB does not apply to being called back, as a call back is unscheduled, unplanned, and mandatory.

On call and call back pays are covered in Article 13.G. of the contract. It provides that “an employee who is assigned to stand-by/on-call status” will be paid for those hours at an hourly rate specified in the contract. In the case of respiratory care practitioners, including PFTs and the OR blood gas tech, they are paid \$5.75 for every hour they spend on “on-call status.” (G.C. Ex. 4, pp. 56-57, and G.C. Ex. 48.) Under Article 13.G.2, an employee who is on an assigned on call status will be paid a premium rate of one and one-half (1&1/2) times his/her base rate of pay if he/she is actually called in to work. (G.C. Ex. 4, p. 57.) Another difference between the on call/callback and the ESB under the terms of the contract is that the mandatory on call schedule provision contains a 2 hour minimum pay guarantee, when the employee on call is called back to work, but the ESB provision has no such minimum. (G.C. Ex. 4, pp. 52 & 57.)

From the clear language in the contract, it appears that counsel for the Respondent’s analysis is correct in that on call/callback pay and the ESB are mutually exclusive. Article 13.C.2.d provides that “an employee may not work an ESB shift and collect any other compensation...for the same day worked.” (G.C. Ex. 4, p. 53.) Article 13.G.1 provides that

“[h]ours of standby/on-call will not be considered hours worked for purposes of paying differentials, overtime or any other form of premium pay under this Agreement.” (G.C. Ex. 4, p. 56.) Article 11.N provides that there will be “no pyramiding” of “premium payments for the same hours worked.” (G.C. Ex. 4, p. 38.)

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Accordingly, I am of the view that under the terms of the parties’ collective bargaining agreement, there was no contractual basis for PFTs who were called back to work from the mandatory on call schedule to receive an extra shift bonus. However, the evidence shows that there was some past practice of manager Susan Farr authorizing the payment of an extra shift bonus for called back employees from the mandatory on call schedule for the small group of four or five PFTs who worked under her direction. From the undisputed testimony of Matthew McElrath and George Sarkissian, it is clear that in the approximately 600 employee bargaining unit, no other employees received an extra shift bonus when called back to work from a mandatory stand by schedule, including all the other respiratory therapists who worked in the Respiratory and Pulmonary Diagnostic Services Department. In fact, during her testimony at trial, union agent Sophia Mendoza admitted that she knew of no other hospital employees, besides the small group who worked under Farr’s supervision, who had been receiving an ESB when called back to work from the mandatory on call schedule.

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It is the Respondent’s position that Susan Farr had erroneously paid the PFTs the ESB. When that error was discovered, the Respondent ceased making such payments. The Respondent contends that doing so did not constitute a unilateral change in the PFTs’ terms and conditions of employment and that no bargaining with the Union was necessary, as under the terms of the contract such payments should not have been made. On the other hand, counsel for the General Counsel, in her post-hearing brief, argues that the payment of the ESB to the PFTs, at least since the Respondent purchased the Hospital on April 1, 2009, established a past practice. She contends that the Respondent violated the Act when it unilaterally discontinued making those payments. It is, therefore, important for the undersigned to determine the extent of any such past practice.

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In an effort to establish a past practice, counsel for the General Counsel offered the testimony of PFT Darren May and his payroll records for a period of time in April and September of 2010. (G.C. Ex. 49 & 50.) However, regarding his receipt of ESB payments, I found May’s testimony confusing and the payroll records unhelpful. May’s testimony seemed inconsistent and was very difficult to follow. He was uncertain as to payroll terminology such as “overtime,” “double time,” and “call back.” In referring to his payroll records, May acknowledged that the math shown on the records did not match his understanding of how he was paid. At one point he acknowledged that, “My math is something [sic] wrong.” In fact, his testimony regarding the receipt of ESB payments was so confusing that the undersigned commented about it on the record, with the stated hope that counsel for the General Counsel would be able to clarify the issue in her post-hearing brief. However, no clarification was forthcoming.

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On the other hand, in any effort to establish that there was no consistent past practice regarding the payment of ESB to PFTs called back to work from the on call schedule, but, rather, only random, isolated, mistakes by supervisor Farr, the Respondent offered into evidence “payroll registers” for the PFTs at issue. These reports are generated by the Respondent’s Kronos payroll system, which reflect what hours the employee worked, how much he/she was paid in each pay category, the rate of pay at which different hours were paid, the total hours, and the total amounts paid in each category. (Res. Ex. 38-42.) While I found these records also difficult to comprehend, it is at least apparent from the registers that PFT employees Darren May, Bail Nasir, Roxana Medrano, Lisa Rogers, and Ruben Duran did occasionally receive an extra shift bonus (ESB), which is reflected in the register as “DIFF B.” However, beyond that I was unable to determine any pattern, rhyme, or reason for the

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payments. It appeared from the registers that sometimes the ESB payments were being made, and at other times not so. Perhaps this is not surprising, as it is clear that the collective bargaining agreement did not provide for such payments. If the payments were being occasionally made because of Farr's error in approving them, it seems reasonable that sometimes the payroll system approved the payment, and at other times did not do so.

It is apparent that the Respondent's payroll system, covering approximately 600 employees in the Unit, with many different salaries, bonuses, overtime pay, and many other variables is a highly complicated system. As I have indicated, I found the payroll records of limited value in determining whether the PFTs received any sort of regular ESB for being called back to work. Therefore, I am merely left with the testimony of the PFTs that they were regularly paid an ESB for this work. Specifically, Darren May and Basil Nasir testified at length that over the course of their employment, they had regularly received an ESB when they were called back to work from the on call schedule. While the confusing payroll records somewhat call into question the precise regularity with which they received ESB pay, I believe that they testified credibly. Despite their confusion over the payroll records, I am convinced that to the best of their knowledge, they received this ESB pay, until it was discontinued by the Respondent around October 1, 2010. This does not mean that they always received the ESB payment for call back work, but that they received it often enough to believe that they were entitled to it.

The Respondent argues that the sporadic payment of the ESB to four or five PFTs due to a mistake by supervisor Farr should not be considered a past practice where the contract provides otherwise, and the benefit has not be conferred on the other respiratory therapists in the Respiratory and Pulmonary Diagnostic Services Department, or, for that matter, on the other approximately 600 employees in the Hospital. Counsel for the Respondent argues that the burden of proof to establish a past practice rests with the party seeking to establish that practice. I agree that is where the burden lies, and while it is not entirely free from doubt, I believe that the General Counsel has met that burden.

Further, as I noted earlier, Farr did not testify. It was represented by counsel for the Respondent that Farr's doctor had advised her not to testify at this proceeding as it could prove stressful and exacerbate an existing medical condition. I have no reason to doubt that representation by counsel, nor the letter counsel produced purportedly from Farr's doctor. Never-the-less, I will draw an adverse inference from Farr's failure to testify. She remains a supervisor employed by the Hospital. One would reasonably assume that she would normally be a friendly witness for the Respondent. Since she chose not to testify, I must conclude that had she done so, she would not have supported the Respondent's position, but, rather, that of the PFTs and would have testified that on a regular basis they did receive an ESB for a call back to work from the on call schedule. *International Automated Machines*, 285 NLRB 1122, 1122-23 (1987), enfd. 861 F.2d (6<sup>th</sup> Cir. 1988).

There is a line of Board cases standing for the proposition that even though an action may have been initiated through a mistake, an employer's regular and longstanding practices that are neither random nor intermittent become terms and conditions of employment even when these practices are not required by a collective bargaining agreement. As such, these past practices cannot be changed without offering the unit employees' collective bargaining representative notice and an opportunity to bargain. *Sunoco, Inc.*, 349 NLRB 240, 244 (2007), citing: *Granite City Steele Co.*, 167 NLRB 310, 315 (1967); *Queen Mary Rest. Corp. v. NLRB*, 560 F.2d 403, 408 (9<sup>th</sup> Cir. 1977); *Exxon Shipping Co.*, 291 NLRB 489, 493 (1988); *B & D Plastics*, 302 NLRB 245 fn. 2 (1991); *DMI Distrib. of Delaware*, 334 NLRB 409, 411 (2001); See *Prime Healthcare Servs.-Garden Grove LLC*, 357 NLRB No. 63 (2011) (employer due to clerical errors, allowed certain reserve sick leave benefits to accrue for employee for approximately 9

months, now considered a past practice over which the employer must negotiate).

As noted above, the Union filed a grievance over the Respondent's discontinuance of the ESB pay for the PFTs. A grievance meeting was held over the grievance on December 9, 2010. In attendance at this meeting were Sophia Mendoza, Basil Nasir, PFT Lisa Rogers, and Eva Herberger. The Union and the employees argued that the payment of the ESB was a past practice, and that the Union had not been notified prior to the Respondent unilaterally discontinuing the practice about October 1, 2010. The Union then offered a proposal, which while not entire clear, apparently was to make the OR blood gas lab on call schedule voluntary instead of mandatory, giving the PFTs the first right to sign up for open slots, and if the open slots were not filled by the PFTs, then the other respiratory therapists would be allowed to fill the open slots.

In early January 2011, Herberger had a brief phone conversation with Mendoza, during which Herberger indicated that the Respondent was agreeing to the Union's proposal to eliminate the pulmonary diagnostic services blood gas lab on call schedule. Mendoza denied that the Union had made such a proposal, but time apparently did not permit her to explain further.

Several days later, a meeting was held to discuss this matter with Mendoza, May, Nasir, Farr, and Herberger in attendance. According to union agent Mendoza, the Union took the position that if the Respondent was refusing to pay the ESB to employees for hours worked from the on call schedule, then the Union was proposing that the on call schedule be voluntary, rather than mandatory, allowing the PFTs the first right to voluntarily sign up on the on call list, after which the other respiratory therapists would be allowed to fill any slots still open. Further, the Union was proposing that if an employee was then called back to work from the on call list, that person would receive the ESB. Mendoza testified that Herberger's response was to reject the Union's suggestion and to say that instead the Respondent intended to eliminate any OR on call schedule for the pulmonary department. Further, Herberger allegedly said that going forward the lead respiratory therapists and the clinical coordinators in the respiratory department would be taking over the work in the OR blood gas lab. Mendoza informed Herberger that such an action on the part of the Respondent would constitute a unilateral change.

Herberger's testimony is somewhat different. She contends that as the PFTs were refusing, in the absence of ESB money, to continue with a mandatory on call schedule for the OR lab, it was the Hospital's decision to make the on call schedule voluntary and available to all the respiratory therapists in the department on a first come basis. Beginning in February 2011, all the employees in the pulmonary function lab have been given the opportunity to sign up voluntarily for extra shifts. The other respiratory therapists can also sign up for those extra shifts. Employees who work an extra shift from the voluntary on call schedule are being paid an ESB. However, the PFTs no longer have priority for the formerly mandatory, now voluntary, on call schedule.

As noted above, I have concluded that there was a past practice at the Hospital of paying the PFTs an ESB when they were called back to work off of the mandatory on call schedule. Therefore, the Respondent committed an unlawful unilateral change when about October 1, 2010, it eliminated that past practice without bargaining with the Union and ceased the ESB payments to the PFTs who were called back to work. Further, I conclude that about February 1, 2011, the Respondent committed an unlawful unilateral change when it eliminated the OR blood gas lab mandatory on call schedule for the PFTs, converting it to a voluntary on call schedule available to all respiratory therapists, without first bargaining with the Union.

It is, of course, long, well established Board and court authority that an Employer

violates Section 8(a)(5) and (1) of the Act if it makes a unilateral change in the wages, hours, working conditions, or other terms and conditions of employment of its employees without first giving a union representing a unit of employees notice and an opportunity to bargain. See *NLRB v. Katz*, 369 U.S. 736, 743 (1962). An employer's unilateral change certainly constitutes an 8(a)(5) violation when numerous bargaining unit employees are affected, and can even constitute an 8(a)(5) violation when only one employee is affected by the change. See, e.g., *Millwrights, Local 1031*, 321 NLRB 30, 32 (1996); *Kentucky Fried Chicken*, 341 NLRB 69, 84 (2004) (employer committed a violation by changing the job duties of one single employee).

Further, although the Union and the Hospital may have discussed the ESB and on call issues, these discussions certainly did not rise to the level of negotiations. Similarly, the notice given to the Union of the Hospital's intention to discontinue payment of an ESB to PFTs who were called back to work from the on call schedule and/or of the discontinuation of the mandatory on call schedule were made as a *fait accompli*. Such notification did not constitute an offer or invitation to bargain. To the contrary, it indicated an inflexible position from which bargaining would be futile. *S&I Transportation*, 311 NLRB 1388, 1388 at fn. 1 (1993) (finding a *fait accompli* where employer's testimony at hearing revealed employer's fixed position to implement changes).

Accordingly, based on the above, I conclude that the Respondent violated Section 8(a)(5) and (1) of the Act when it unilaterally eliminated the extra shift bonus for pulmonary function technicians and eliminated the OR blood gas lab mandatory on call schedule for the pulmonary function technicians, as alleged in complaint paragraphs 10 through 13, 18 and 19.

## **B. The Echo Technician Schedule**

In paragraphs 14, 18, and 19 of the complaint, the General Counsel alleges that the Respondent unilaterally and unlawfully changed the work shifts for the echo tech employees from 3-day, 12 hour shifts to 5-day, 8 hour shifts. The echo technicians employed at the Hospital are responsible for taking ultrasound images of patients' hearts in order to look for any abnormalities in the valves and fluids of the heart.

The collective bargaining agreement between the parties provides a process for implementing schedule changes. Article 11, Section F.7 states: "Should the Employer determine that it is necessary to change/revise a schedule(s) for more than sixty (60) days...the Employer agrees to notify the union in writing no less than 30 days prior to the implementation date. If the Union requests, the Employer will meet with the union steward and or union representative to make a reasonable attempt to review/revise the schedule so as to have the least impact on the fewest number of full-time and part-time staff possible...." (G.C. Ex. 4, p. 32.)

Cory Cordova, the former field representative for the SEIU at the hospital facility until May 2010, was called as a witness by the Respondent. As noted earlier, it was the SEIU and Tenet that were the original parties to the collective bargaining agreement, the terms of which agreement were subsequently adopted by the Respondent after it purchased the Hospital, and then adopted by the NUHW after that Union became the collective bargaining representative of the employees in the Unit. Cordova testified as to the practice in effect between Tenet and the SEIU and then between the Respondent and the SEIU during the period of time that he was the field representative for the SEIU at the hospital facility. According to Cordova, if there was going to be a schedule change, then the SEIU would get a call, an email, a letter, or employees would get notice of the change, and if the SEIU had a problem with the change, it could bring the issue up with the Hospital. He clearly testified that if the conversation with the Hospital did not result in a resolution, the SEIU did not have the authority under the contract to block the

schedule change. Further, he testified that while the SEIU could file a grievance under the terms of the contract for improper notice of the schedule change or over the change itself, ultimately the Hospital would prevail, as it had the contractual authority to implement a schedule change.

According to Cordova, although the contract provided that the Hospital notify the SEIU in writing at least 30 days prior to the implementation of a schedule change, the practice had been for notice to be received "through many avenues." From his testimony it appears that such notice could also be received by the affected employees, who he characterized as "the Union."

From the testimony of various witnesses, it is undisputed that the echo techs work in conjunction with other team members in the cardiology department, including nurses, EKG techs, physicians, and anesthesiologists. After performing various echocardiography tests, the echo techs log the patients' information and upload the information on the computer. Doctors then review the information, which may result in questions that need to be addressed by the technician who did the study. It was the Respondent's position that the 3-day, 12 hour shift worked by the echo techs did not always permit a physician who had questions about an echocardiography test to be able to direct those questions to the specific tech who had performed the test. The undisputed witness testimony was that medical staff complained that the echo tech coverage was inadequate to meet the needs of the patients, as the 3-day work schedule resulted in physicians not always being able to interface with those techs that they wanted to question about test results. Further, there was testimony that physicians complained about the deterioration in the quality of the work performed by the techs when they were working late into the day during a 12 hour shift. Ultimately, the Hospital decided that the only way to remedy the situation was to require the echo techs to go to a 5-day a week, 8 hour shift, which would allow for more continuity of service and better communication between the techs and the physicians and other staff that worked a more regular 8 hour schedule.

On about October 20, 2010, Clinical Director Susana Perese spoke with Human Resources Manager Eva Herberger about the need to change the schedule for the echo techs. Herberger said that she would so inform the Union. Herberger testified that at a meeting with union representative Antonio Orea on October 22, 2010, she informed him that management intended to change the schedule for the eco techs to 5 days, 8 hours a day, and that he expressed no opposition. However, at the trial, Orea denied that the echo tech schedule had been discussed during this meeting. In any event, during Herberger's testimony, the Respondent had admitted into evidence a copy of a letter from Orea to Herberger dated October 18, 2010, confirming a meeting the parties were to have on either October 19 or 20. Attached to that letter was a copy of a posted note, allegedly made by Herberger at the time of the meeting, in which there is a reference to "advising Antonio [Orea]" of the intent to change the "echo techs" schedule from "12" hour shifts to "8" hour shifts, with Orea's response being "ok." (Res. Ex. 67.)

The Respondent's managers and admitted agents Susana Perese, Tarek Salaway, and Rafael Llerena met with the eco techs in early November 2010. During this meeting, Perese informed the techs that in order to improve patient care, the Hospital had decided to have the techs move to an 8 hour schedule, 5 days a week. There was some opposition expressed during the meeting by certain techs, but Perese indicated that this was a management decision, which the Hospital intended to implement for 3 months on a test basis, after which it would be reevaluated. The managers announced that the schedule change would begin in January 2011.

Union representative Sophia Mendoza, who replaced Orea, testified that in early November she was informed by the eco techs of management's decision to change their work schedules. The Union contends that this was the first notice it received about the schedule

change for the echo techs.

By memo dated November 13, 2010, the echo techs were informed by management that effective January 2, 2011, their schedules would be changed to 5 days a week, 8 hour shifts.

5 There is no indication from the memo that a copy was sent by the Hospital to the Union, and no such claim has been made. (G.C. Ex. 27.) Also, certain witnesses testified that they did not receive this memo until almost a month after it was dated.

10 According to Mendoza, she had a meeting with Herberger on November 29, 2011, to discuss various issues, including the schedule change for the echo techs. Mendoza testified that she informed Herberger that the Union wanted to meet and negotiate over this issue, and that Herberger seemed not to know much about it. Also, according to Mendoza, Herberger was unconfused about which group of employees was in issue, since the vascular technicians were also having a schedule change at about the same time. Herberger did appear to be confused, 15 and she attempt to correct herself when that same day she sent Mendoza an email saying that, "[i]t is the Echo Techs who are the 12 hour employees," and the "change is specifically for the vascular lab staff." (G.C. Ex. 34.) However, it appears that Mendoza may have been equally confused, as in an email the following day (November 30) under the title "follow up," listed among a number of matters, was a reference to the "[c]hange in schedule for Vascular Lab 20 Techs." (G.C. Ex. 35.) While it is obvious that there was confusion between Mendoza and Herberger over these two groups of employees, it is impossible from their correspondence to know just who was more confused.

25 In any event, by email dated December 22, 2010, Mendoza informed Susan Perese that the Union had become aware of the Hospital's announced "unilateral change in the Echo Techs' schedule," effective January 2, 2011. Further, according to the email, the change was "a violation of past practice and the terms and conditions of the old collective bargaining agreement...[and] a violation of the National Labor Relations Act...." The email ended with Mendoza saying: "The union demands that you cease and desist from implementing any and all 30 changes related to this issue until all parties have completed good faith negotiations. Should you wish to continue with this change the union demands to bargain over it...." (G.C. Ex. 36.)

35 On January 4, 2011, during collective bargaining negotiations, a side-bar discussion regarding the echo tech schedule was held between Mendoza, echo technician Barry Martin, Herberger, and counsel for the Respondent Deacon and Lester Aponte. The new schedule had apparently been implemented several days earlier. According to Mendoza's testimony, she complained that despite repeatedly asking for a meeting to discuss the schedule change, she had never heard back from the Hospital, and now the change had been implemented. Mendoza wanted to know why the Hospital needed to make such a schedule change and why its needs 40 could not be addressed without having such an impact on the echo techs. Further, she was concerned that the employees had originally been told that the change would only be on a 3 month trial basis, and yet now it appeared that the change was permanent. She also reminded the Employer's representatives of her earlier email of December 22, 2010, asking the Hospital to "cease and desist" from changing the schedule. Deacon alleged said that she needed to 45 speak with Perese about this matter, after which she would get back in touch with the Union.

Mendoza sent the Employer two additional communications regarding this matter. On January 5, 2011, she sent Herberger an email with an attached letter listing outstanding grievances and issues remaining between the parties, which list included "the change in the 50 Echo Techs schedules." (G.C. Ex. 37.) On January 18, 2011, she again sent Herberger an email with an attached letter. Among other matters, that letter referenced the Union "still waiting on your response to set a date to meet...[regarding] the changes in the schedule for the Echo Techs." (G.C. Ex. 38.) Mendoza testified that the Union has never received a response to

either of these two letters.

It is the General Counsel's position that the Respondent unilaterally changed the work schedule of the echo techs without following the terms of the parties' collective bargaining agreement, and failed to provide the Union with 30 days written notice and an opportunity to review and discuss with the Employer the proposed schedule change so as to have the least impact on the affected employees, as provided for in that contract. On the other hand, the Respondent argues that it followed the past practice, as well established by the SEIU and the Hospital, to give oral notice to union members and/or the union representatives of any proposed schedule change, and that the Union failed to indicate what problems or objections, if any, it had with the proposed changes. The Respondent denies that its actions constituted an unlawful unilateral change in the parties' collective bargaining history or in the terms of the contract.

I agree with the position of the General Counsel that the Respondent failed to abide by the terms of the collective bargaining agreement when it unilaterally changed the schedule of the echo techs. Since the NUHW became the collective bargaining representative of the employees in the Unit, the Respondent and the Union have honored the terms of the collective bargaining agreement originally entered into by the SEIU and Tenet. (G.C. Ex. 4.) The language of Article 11, Section F. 7 of that contract is clear and unambiguous. If the Hospital determines that it is necessary to change the work schedule of more than 3 employees, it "agrees to **notify the Union in writing** no less than 30 days prior to the implementation date. If the Union requests, the Employer will meet with the union steward and or union representative to make a reasonable attempt to review/revise the schedule so as to have the least impact on the fewest number of full-time and part-time staff possible."<sup>5</sup> (*Id.* p. 32, emphasis added.)

It is axiomatic that an employer violates Section 8(a)(5) of the Act when it makes a unilateral change in unit employees' terms and conditions of employment without first giving the union notice and an opportunity to bargain over the change. *NLRB v. Katz*, 369 U.S. 736 (1962). Further, it is well established that changes in employee work shifts involve mandatory subjects of bargaining. *Meat Cutters Local 189 v. Jewel Tea Co.*, 381 U.S. 676, 691 (1965) ("the particular hours of the day and the particular days of the week during which employees shall be required to work are subjects well within the realm of 'wages, hour, and other terms and conditions of employment' about which employers and unions must bargain"); *United Cerebral Palsy of New York City*, 347 NLRB 603, 607 (2006).

In the case before me, the Respondent decided to change the schedule of the echo tech employees. It does appear to the undersigned that the Hospital had a good reason, directly related to patient care, for wanting to make this schedule change. But, that does not relieve the Respondent of the contractual obligation to "notify the Union in writing" at least 30 days prior to the implementation date. The Respondent did not do so. Employees were orally notified of the Respondent's decision as early as the first part of November 2010, and those employees informed union representative Sophia Mendoza of the impending schedule change. Also, by November 13, 2010, the Respondent had sent written notice of the impending schedule change to the affected employees, advising them that the change would begin on January 2, 2011. (G.C. Ex. 27.) However, the Respondent did not send a copy of this notice to the Union.

The Respondent contends that Human Resources Manager Herberger first orally advised the Union of its intent to change the echo techs schedule when she met with Antonio Orea in October of 2010. Orea was Mendoza's predecessor as union representative, and he

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<sup>5</sup> It is undisputed that the decision to change the echo techs' schedule involved more than 3 employees.

denies receiving any such notice. On November 29 Mendoza and Herberger did apparently orally discuss the echo tech schedule change, but there was confusion with the schedule of another group of employees, the vascular lab techs. In fact, the first conclusive, unambiguous written reference to the impending schedule change for the echo techs was an email dated  
 5 December 22, 2010, from Mendoza to Susan Perese telling her that the Union objected to the impending schedule change, and to cease and desist from making this "unilateral change," until the parties had an opportunity to negotiate over this issue. (G.C. Ex. 36.) Thereafter, the change in the echo techs' schedule went into effect on January 2, 1011, without the Respondent ever notifying the Union in writing of its intent to do so.

10 The Respondent argues that, despite the contractual language requiring written notice to the Union, its oral notice to Orea and Mendoza, and/or its oral and written notice to the individual echo tech employees was sufficient notice of the impending schedule change because that was the past practice established between the SEIU and the Hospital. As noted  
 15 earlier, Cory Cordova, the SEIU's representative at the hospital facility during certain periods when the SEIU previously represented the unit employees, testified that although the contract speaks of written notice to the Union of a schedule change, in practice, the Hospital has given notice through many avenues, both oral and written. According to Cordova, the SEIU never insisted on the notice being in writing and always deemed notice to the employees the same as  
 20 notice to a union official. Therefore, counsel for the Respondent argues that when the echo techs were orally notified by their managers of the impending schedule change and/or when Mendoza and Orea were orally notified, that should have been sufficient notice to the Union, upon which the Union could have requested to meet and discuss the change. Arguing that the Union made no such timely request, it is the Respondent's position that the Hospital was not in  
 25 violation of the contract and did not engage in an unlawful unilateral change when it implemented the schedule change for the echo techs.

Cordova's testimony is not persuasive. As counsel for the General Counsel points out in her post-hearing brief, perhaps the SEIU, through its past practice, had waived its right under  
 30 the terms of the contract to receive written notice directed to a union representative of the Hospital's intent to change the work schedule of unit employees. However, a newly certified Union, such as the NUHW, cannot be held to the predecessor union's failure to enforce provisions in a collective bargaining agreement. The Board has specifically held that acquiescence to unilateral employer actions by a predecessor union is not imputed to a newly  
 35 certified incumbent union. *Eugene Iovine, Inc.*, 328 NLRB 294, 296-297 (1999) (predecessor union acquiescence to employer reduction of employee hours not imputed to newly certified union); also see *University of Pittsburgh Medical Center*, 325 NLRB 443, 443 (1998) (waiver by predecessor union found inapplicable to incumbent union).

40 I am of the view that the Respondent was in violation of the contract when on January 2, 2011, it changed the work schedules of the echo techs without having given the Union 30 days written notice and an opportunity for the Union to discuss this issue with the Respondent in an effort to ensure that the change would have the least impact on the fewest number of  
 45 employees. Under the terms of the contract, oral notice to the Union would not have been sufficient, and notice to unit employees, who are not agents of the Union, would also not have been sufficient. The contract unambiguously requires 30 days written notice to the Union, meaning agents of the Union such as Mendoza or Orea. That did not happen.

50 Further, it is of no consequence whether, as testified to by Cordova, the contract does not permit the Union to block the Hospital's proposed schedule change. It provides for an opportunity, following the receipt of written notice, for the Union to "request" a meeting with the Hospital. Following that "request," "the Employer will meet with the union steward and or union representative to make a reasonable attempt to review/revise the schedule so as to have the

least impact on the fewest number of full-time and part-time staff possible.” (G.C. Ex. 4, p. 32.) Any such meeting could certainly have resulted in a modification of the Respondent’s proposed schedule change for the echo techs. Whether it would have had such a result or not, and whether the Union could have ultimately blocked the proposed change or not, is really irrelevant to the issue before me.

The Respondent made the schedule change for the echo techs unilaterally and in violation of the contract, which required 30 days written notice to the Union before making any such change. Accordingly, I conclude that the Respondent has failed and refused to bargain collectively with the Union in violation of Section 8(a)(5) and (1) of the Act, as alleged in complaint paragraphs 14(a), (b), (c), 18, and 19.

### C. The 7 Minute Grace Period

The General Counsel alleges in paragraphs 15, 18, and 19 of the complaint that the Respondent unilaterally and unlawfully eliminated a 7 minute “grace period” that had been allowed to certain employees when clocking in for the start of their shifts. Further, it is alleged that concomitantly the Respondent began to discipline these employees who arrived for work 7 minutes or less after the start of their shifts, and did, as a result, unlawfully issue a written warning to employee Michael Torres and unlawful verbal corrections to employees Traci Mills and Melissa Lynch for tardiness. However, the Respondent denies that it ever had a policy or practice of giving certain employees a 7 minute grace period when clocking in for the start of their shifts. It alleges that any discipline issued to employees for tardiness was in accordance with its normal policies and procedures.

Employees at the Hospital use an individual badge to swipe in and out recording their arrival and departure times. The Respondent’s payroll timekeeping system is known as the Kronos system. It is undisputed that for payment purposes only, if an employee arrives at work and swipes in 8 minutes or later beyond his/her scheduled start time, that employee’s pay will be docked by at least 15 minutes. On the other hand, for an employee who arrives at work and swipes in between 1 and 7 minutes beyond his/her scheduled start time, that employee’s pay will not be docked at all. Rather, for payment purposes, that employee’s arrival time will be rounded back to the employee’s actual scheduled start time. It is important to stress that this payroll practice, which is hospital-wide, is separate and distinct from the Respondent’s tardiness policy.

It is the Union’s and the General Counsel’s position that since at least 2009, employees in 3 of the Hospital’s departments, Laboratory, Respiratory, and EVS, were led to believe by their managers that in addition to not being docked pay for being 7 minutes or less late to work, tardiness of 7 minutes or less would not count against them for disciplinary purposes. The Respondent argues to the contrary that since 2002, the hospital has had a facilities-wide tardiness policy, without any grace period.

The Respondent offered into evidence a number of written attendance and punctuality policies that had been in effect at the facility beginning under Tenet’s ownership, and continuing through the present time. It appears that these policies were intended to be applied hospital-wide. For example, an operating policy the Human Resources Department addressed to “All Hospital Staff,” effective May 1, 2002, reads, “Tardiness: Any time an employee arrives late at workstation and/or is not dressed appropriately and ready to work at the beginning of the assigned shift. **There is no grace period.**” (Emphasis added by the undersigned.) (Res. Ex. 65, p. 2.) Also, in a revised memo to “All Hospital Staff” dated June 28, 2005, the employees were advised as follow: “Tardiness: Any time an employee arrives late at workstation, which includes returning from breaks and meal periods and/or is not dressed appropriately and ready



to work at the beginning of the assigned shift. **Start times have no grace period** for dressing or clocking i.e., if shift start at 7:00 a.m. employee must be ready to report to work at that time.” (Emphasis added by undersigned.) That same memo further stated, “Tardiness is based on arrival and/or departure as scheduled for shift start and end times. It is not associated with time reporting or payroll clock in times.” (Res. Ex. 66, p. 1-2.) That same language can be found in a written attendance & punctuality policy addressed to “All Hospital Staff” as recently as January 26, 2010, which states: “Tardiness: Any time an employee arrives late at workstation....**Start times have no grace period** for dressing or clocking....Tardiness is based on arrival and/or departure as scheduled for shift start and end times. It is not associated with time reporting or payroll clock times.”<sup>6</sup> (Emphasis added by undersigned.) (Res. Ex. 1.)

Despite the often repeated language in the above cited memos that there was no grace period for tardiness, it is the General Counsel’s position that the Hospital’s managers created an exception in three of the facility’s many departments, namely Laboratory, Respiratory, and EVS, which exception they allegedly later unilaterally discontinued.<sup>7</sup> However, the facts and law do not support the General Counsel’s contention.

In 2006, while the hospital facility was still owned by Tenet, there was an arbitration over a grievance filed by the SEIU regarding that union’s claim that the employer was not honoring the practice of granting a 7 minute grace period for tardiness. According to the testimony of Human Resources Manager Eva Herberger, the arbitrator ruled in favor of the employer and found that the hospital facility had never had a policy of allowing for a 7 minute grace period. Herberger testified that she had personally handled the original grievance, which grievance was actually filed by Michael Torres on behalf of the SEIU. The grievance was expedited under the terms of the parties’ collective bargaining agreement as a “hot button” arbitration. Herberger testified that subsequently Tenet received a favorable decision from the arbitrator.

Counsel for the Respondent represented that the arbitration award had been lost by the former employer, Tenet, and, therefore, could not be produced at trial. To the contrary, counsel for the General Counsel disputed that representation, arguing that no such arbitration award was ever issued. However, Torres’ testimony seems to undercut the General Counsel’s position. According to Torres, in February of 2006, he was given a verbal reprimand from Tenet for a number of instances of tardiness, several of which instances were for 7 minutes or less. (Res. Ex. 2.) He admitted filing a grievance over the alleged grace period issue, acknowledged that the grace period issue went to a hot button arbitration, and further admitted that he went to Oakland, California to participate in the arbitration over this issue. Incredibly, Torres, who was a very active union supporter and union steward while represented by the SEIU, testified that he “never saw” the arbitrator’s decision on this issue, and could not say what it might have been.

I find Torres’ testimony that he was unaware of, and never saw, the arbitrator’s decision regarding the alleged 7 minute grace period to be totally incredible. He had himself been disciplined for being less than 7 minutes late for work. He was obviously concerned about this matter, as he filed a grievance over this issue, and went to Oakland to participate in the arbitration. For him to suggest that he does not know the outcome of the arbitration simply defies credulity. On the other hand, I find the testimony of Eva Herberger to be very credible. She was personally involved with the 7 minute grace period grievance and testified that the

<sup>6</sup> Almost identical language can be found in other policy memos issued on numerous dates. For example, see Res. Ex. 63, revised date March 31, 2006.

<sup>7</sup> While the complaint originally charged that the Respondent had unilaterally discontinued honoring the 7 minute grace period for employees throughout the Unit, the General Counsel amended the complaint at trial to limit this allegation to the 3 named departments. (G.C. Ex. 2.)

arbitrator issued a decision favorable to the employer. This certainly is supported by subsequent memos issued by Tenet and the Respondent, as noted above, one of which apparently closely followed the arbitrator's decision. That memo dated March 20, 2006, addressed to "All Employees" specifically reminded the employees that, "Start times have **no** **grace period** for dressing or clocking i.e., if shift starts at 7:00 a.m. employee must be ready to report to work at that time." (Emphasis added by the undersigned.) (Res. Ex. 3.) Therefore, I conclude that there was an arbitration over this issue in 2006, and that an arbitrator subsequently issued a decision finding that the employer, which was at the time Tenet, did not allow for a 7 minute grace period as to tardiness.

I do not find convincing the General Counsel's contention that out of all the Hospital's many departments where the tardiness policy was apparently strictly enforced, there were 3 departments, Respiratory, Laboratory, and EVS, where an exception was made for tardiness of 7 minutes or less. Such a contention is not supported by sufficient evidence necessary to support the General Counsel's burden of proof. To the contrary, the probative evidence of record shows that not only was there no such exception during the time that Tenet owned the facility, but that no such exception has existed since the Respondent purchased the facility in 2009. While there certainly may have been isolated incidents where employees in these 3 departments were 7 or less minutes late for work and not disciplined for violating the tardiness policy, there clearly were other incidents where they were so disciplined.

For example, employee Noemi Aguirre in the Respiratory Department was disciplined on April 21, 2010, with 7 of the 8 occurrences listed on the write-up being less than 7 minutes. (G.C. Ex. 15.) Also, Margaret Knight in the Respiratory Department was disciplined on April 15, 2010, with 5 of the 8 occurrences listed on the discipline form being less than 7 minutes. (Res. Ex. 35.) Further, Richard Rea in the Respiratory Department received discipline on April 18, 2010, where all 8 occurrences were for less than 7 minutes (Res. Ex. 23.), and Alex Corea in the same department received discipline on April 15, 2010, where all 8 occurrences were for 7 minutes or less. (Res. Ex. 16.) Similarly, Allen Ravago of the Respiratory Department was disciplined for tardiness in March and April of 2010 where 6 of 8 occurrences were for 7 minutes or less. (Res. Ex. 17.)

Even assuming a pattern of leniency existed in the Laboratory, Respiratory, and EVS Departments, which pattern I do not find, for tardiness of 7 minutes or less, it is beyond dispute that the approximately 600 employees in the Unit were exposed to a series of written memoranda from the Hospital Human Resource Department, as listed above, which clearly and unambiguously set forth the Employer's policy of not allowing a grace period for tardiness. These memos spanned the period from at least May 1, 2002 (Res. Ex. 65, p. 2. ) through at least January 26, 2010 (Res. Ex. 1.), which period covered both the time that Tenet operated the hospital and that period after the Respondent purchased the facility. No evidence was offered by the General Counsel to show that any individual manager or supervisor in the Laboratory, Respiratory, or EVS Departments had the actual authority to alter or modify the Hospital's well established policy as to tardiness.<sup>8</sup>

In fact, the collective bargaining agreement between Tenet and the SEIU, which contract was honored by the Respondent and the Union following the Respondent's purchase of the facility and the Union's certification, specifically states under "Modification of Practices" that,

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<sup>8</sup> While various supervisors are alleged to have orally told a few employees that they would not be disciplined for being tardy by 7 or less minutes, such statements are in dispute. Further, Counsel for the General Counsel has failed to establish that such supervisors had the apparent authority to deviate from the Respondent's written policy against allowing for a grace period.

“There shall be no individual bargaining with employees over wages, hours, and working conditions.” (G.C. Ex. 4, p. 61, Article 13. Q.) Had managers or supervisors in the 3 departments in question decided to formally and consistently provide the employees in those departments with a leniency policy that excused tardiness of 7 minutes or less, they would have  
 5 been in direct conflict with the written hospital policy on tardiness, and in violation of the contract, which prohibited individual bargaining with employees.<sup>9</sup> In any event, the evidence shows that at most the supervisors in those departments chose, from time to time, to show certain of their employees some leniency and not consider tardiness of 7 minutes or less towards discipline. Such an *ad hoc* bending of the Hospital’s tardiness policy did not create a  
 10 past practice, which would, thereafter, require the Respondent to bargain with the Union before enforcing the hospital-wide policy against a grace period.

Any occasional excusing of employee tardiness for 7 minutes or less by supervisors in the Respiratory, Laboratory and EVS Departments was random and intermittent, and did not,  
 15 therefore, require the Hospital to engage in bargaining with the Union prior to continuing to enforce the long standing hospital policy against any grace period. No past practice requiring collective bargaining was established by this conduct. See *Sunco, Inc., supra*; *Granite City Steele Co., supra*; *Queen Mary Rest. Corp. v. NLRB, supra*; *Exxon Shipping Co., supra*; *B & D Plastics, supra*; *DMI Distrib. of Delaware, supra*; *Prime Healthcare Servs.-Garden Grove LLC, supra*.  
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Accordingly, I concluded that the Respondent has never established a policy of allowing employees in the Respiratory, Laboratory, and EVS Departments a grace period for arriving at work 7 minutes or less after the start of their shifts. Further, I conclude that the Respondent did  
 25 not engage in a refusal to bargain with the Union when it disciplined employees Juan Michael Torres, Traci Mills, and/or Melissa Lynch for arriving at work 7 minutes or less after the start of their shifts. Therefore, I shall recommend that complaint paragraph 15 (a), (b), (c), (d), and its subparagraphs be dismissed.

#### 30 **D. The Discipline of Juan Michael Torres**

The General Counsel alleges in paragraphs 17 and 20 of the complaint that the Respondent unlawfully disciplined Juan Michael Torres on March 18, 2011, by issuing to him a written warning for unexcused absences and by issuing to him a written warning for tardiness,  
 35 and on April 7, 2011, by issuing to him a written warning and a 24-hour suspension for tardiness. In addition to alleging that Juan Michael Torres was disciplined under a tardiness policy that the Hospital unilaterally implemented, it is also the General Counsel’s contention that Torres was treated in a disparate fashion because of his union and protected concerted activity for which he was, as noted, issued two written warnings on March 18 and another written  
 40 warning and 24-hour suspension on April 7, 2011.

As set forth above, it is the Hospital’s position that it had no grace period under its tardiness and attendance policy, and that, in any event, it did not treat Torres in a disparate fashion, but, rather, disciplined him for cause, namely tardiness and unexcused absences,  
 45 totally unrelated to his union or protected concerted activity. While I have, as noted above, already concluded that the Hospital’s long established tardiness policy did not provide for a 7 minute grace period, I must still determine whether Torres was disparately disciplined for

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<sup>9</sup> “Direct dealing between the employer and its employees cuts to the heart of collective bargaining and substantially weakens the union’s role as collective bargaining representative of the workers.” *NLRB v. McClatchy Newspapers, Inc.*, 964 F. 2d 1153, 1159 (D.C. Cir. 1992), citing *Vaca v. Sipes*, 386 U.S. 171, 182 (1967).

tardiness and unexcused absences because of his union and protected concerted activity. I conclude that he was not so disciplined.

In *Wright Line, A Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1<sup>st</sup> Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of 8(a)(1) turning on employer motivation. First the General Counsel must make a *prima facie* showing sufficient to support the inference that protected conduct was a “motivating factor” in the employer’s decision. This showing must be by a preponderance of the evidence. Then upon such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The Board’s *Wright Line* test was approved by the United States Supreme Court in *NLRB v. Transportation Corp.*, 462 U.S. 393 (1983).

In the matter before me, I conclude that the General Counsel has failed to make a *prima facie* showing that Torres’ union and protected concerted activity were a motivating factor in the Respondent’s decision to discipline him. In *Tracker Marine, L.L.C.*, 337 NLRB 644 (2002), the Board affirmed the administrative law judge who evaluated the question of the employer’s motivation under the framework established in *Wright Line*. Under the framework, the judge held that the General Counsel must establish four elements by a preponderance of evidence. First, the General Counsel must show the existence of activity protected by the Act. Second, the General Counsel must prove that the Respondent was aware that the employee had engaged in such activity. Third, the General Counsel must show that the alleged discriminatee suffered an adverse employment action. Fourth, the General Counsel must establish a link, or nexus, between the employee’s protected activity and the adverse employment action. In effect, proving these four elements creates a presumption that the adverse employment action violated the Act. See *American Gardens Management Co.*, 338 NLRB 644, 645 (2002). However, more recently the Board has stated that, “Board cases typically do not include [the fourth element] as an independent element.” *Wal-Mart Stores, Inc.*, 352 NLRB 815, fn.5 (2008) (citing *Gelita USA, Inc.*, 352 NLRB 406, 407, fn.2 (2008)); *SFO Good-Nite Inn, L.L.C.*, 352 NLRB 268, 269 (2008); Also see *Praxair Distribution, Inc.*, 357 NLRB No. 91, fn.2 (2001).

In any event, to rebut the presumption, the Respondent bears the burden of showing that the same action would have taken place even in the absence of the protected conduct. See *Manno Electric, Inc.*, 321 NLRB 278, 280 fn.12 (1996); *Farmer Bros. Co.*, 303 NLRB 638, 649 (1991).

There is no doubt that Torres was an active union supporter, both when the SEIU represented the Unit and later when that representation was by the NUHW. He had been a union steward under the SEIU and remained a union steward under the NUHW. He was a very vocal supporter of both unions. Since approximately 2010, he served as an interim vice president of the NUHW, was elected as a chief shop steward at the Hospital for that Union, and was an elected member of the union bargaining committee. Accordingly, Torres was obviously engaged in activity protected by the Act. In addition, there is no doubt that the Respondent’s managers and supervisors were well aware of Torres’ union activity. The Respondent does not dispute its knowledge of Torres’ significant union and protect concerted activity.

In approximately September of 2010, Tracy O’Connell assumed the position of manager in the Respiratory Department. In early February 2011, Torres met with O’Connell in her office. During this meeting, Torres introduced himself as a chief steward. The purpose of the meeting was to discuss Torres’ attendance problems. O’Connell presented Torres with an Employee Notification form listing the times that he had been tardy. For the period of September 30, 2010 to February 4, 2011, approximately 5 months, he was listed as having been tardy 19 separate

times. (G.C. Ex. 5.) According to Torres' testimony, he disputed many of the occurrences listed on the report, with one of his complaints being that some of the tardies were for 7 minutes or less. It appears that as a result of his tardiness, Torres merely received a verbal warning, although as is reflected at the bottom of the Employee Notification form, 12 unexcused occurrences in a 12 month period may lead to discharge. (G.C. Ex. 5.)

It is the Respondent's position that, rather than being more stringent on Torres because of his union activity, as alleged by the General Counsel, the Respondent was in fact more lenient of Torres than other employees. As an example, the Respondent cites Respiratory Department employee Noemi Aguirre who was given a written warning on July 13, 2011 for at least 9 occurrences in a 12 month period. As can be seen from the Employee Notification that she received, Aguirre was tardy 11 times from October 19, 2010 to October 19, 2011. (Res. Ex. 15.)

On March 18, 2011, Torres received a written warning for 9 occurrences of tardiness between the periods of September 30, 2010, to September 30, 2011. As is reflected on the Employee Notification form, 1 of the tardies is for 7 minutes. (G.C. Ex. 6.) Torres apparently complained about the Respondent's failure to grant him a grace period, as well as his contention that consecutive "tardies should be grouped" so that they only count as one. However, the Respondent's attendance and punctuality policy does not appear to have any such rule, and the General Counsel failed to offer any evidence of such a written rule ever being applied. Also, as counsel for the Respondent points out in his post-hearing brief, such an assertion is really absurd. If such an alleged rule were extended to its logical conclusion, it would mean that as long as an employee was tardy every day, that employee could not receive a second warning for tardiness because all the tardies were consecutive. Obviously, that can not be.

As I noted earlier in this decision, I found Torres incredible when he testified that he was unaware of the arbitrator's award on the issue of the alleged 7 minute or less grace period for tardiness. I find him equally incredible regarding his contention that the Respondent's policy is to count consecutive days of tardiness as one. As I said, such an assertion is absurd.

Also on that same date, March 18, 2011, Torres received a written warning for 7 unexcused absences within 12 consecutive months. (G.C. Ex. 9.) Torres presented a doctor's note (Res. Ex. 5.), which he claimed "retroactively" excused him for being absent on March 16, 2011, and testified that it was the Hospital's policy that an absence will not counted against an employee in such circumstances. However, no evidence of such a practice ever being followed at the Hospital was presented, and the Respondent's supervisor Tracy O'Connell, human resource generalist Dora Castaneda Galvez, and human resource generalist Alex Sylla all testified that no such policy existed. According to the Respondent's witnesses, an absence is excused only if it is approved beforehand by a supervisor. Their testimony appears to be in conformity with the Respondent's published "Attendance & Punctuality" policy. (Res. Ex. 1.) Once again, I find Torres less than credible as he testified in contradiction to the Respondent's written policies.

On April 7, 2011, Torres received a written warning and a 24 work hour suspension based on 10 separate occurrences of tardiness within a 12 month period, from September 30, 2010 to September 30, 2011. One of those occurrences was for 7 minutes or less. (G.C. Ex. 7.) Torres again complained about the Respondent's failure to apply the alleged grace period, and also complained that on one of the dates in question, March 25, 2011, when he was an hour late to work, he had received approved time off by calling the clinical coordinator on duty to let him know that he was going to be late. However, as pointed out by counsel for the Respondent, the Hospital's Operating Policies required that employees "notify their supervisor

at least two hours before the start of their shift if they will be unable to report to work as scheduled.” (Res. Ex. 1, p. 2, Employee Responsibilities, 2.) Further, supervisor Tracy O’Connell credible testified that such notification does not excuse an unscheduled absence, but merely serves to notify management that the employee will be late to work. This is yet another instance where Torres’ claim to unfair and disparate treatment is just not credible. Rather, it appears to the undersigned that the written warning and 24-work hour suspension issued to Torres on April 7, 2011 was justified under the Respondent’s written policy. (Res. Ex. 1.)

Torres has continued to receive discipline for tardiness since that discipline alleged in the complaint. On September 14, 2011, he received a final warning for 12 occurrences from November 25, 2010 to November 25, 2011. As can be seen in the Employee Notification form, as least 2 of those tardies were for occurrences of 7 minutes or less. (G.C. Ex. 10.)

Also, the Respondent has accused Torres of swiping his badge for the purpose of reporting start times at time clocks (the Kronos System) other than the clock nearest his work station so as to make it appear that he is on time for work, when in fact he is in a different area of the Hospital, and, thus, not immediately available to begin work. O’Connell issued Torres a verbal warning for his violation of the Kronos Clocking Policy on September 14, 2011. (Res. Ex. 7, and Res. Ex. 24, p. 2.) At the hearing, Torres did not deny engaging in this practice, which certainly appears to violate the Respondent’s written policy.

There is no question that the two written warnings issued to Torres on March 18, 2011, the written warning of April 7, 2011, and the 24-work hour suspension issued to Torres on April 7, 2011, as alleged in the complaint, all constituted adverse employment actions. However, counsel for the General Counsel has failed to show that Torres’ union and protected concerted activities were the proximate cause of that discipline. Torres was a very active union supporter. But, his union activity was of long duration. There was no specific nexus between that protected activity and his discipline.

As counsel for the General Counsel notes in her post-hearing brief, the question of unlawful motivation is one of fact to be decided based on all the evidence of record. Since direct evidence of motivation is seldom available, it is well settled that unlawful motivation may be inferred from circumstantial evidence as well as direct evidence. In that regard, the Board often considers the timing of the adverse action in relation to the employee’s protected activity to be critical in identifying employer motivation. “Timing alone may suggest anti-union animus as a motivating factor.” *Masland Industries*, 311 NLRB 184, 197 (1993) (quoting from *NLRB v. Rain-Ware, Inc.*, 732 F.2d 1349, 1354 (7<sup>th</sup> Cir. 1984); *World Fashion, Inc.*, 320 NLRB 922, 926 (1996). However, in the matter before me, there was no unusual, or extreme, or sensitive union or protected concerted activity engaged in by Torres at or near the time of the discipline in question. He had been a very active union supporter for a long time, and he continued to be one. There was no indication that his recent activities had upset management or that the Respondent was interested in retaliating against Torres for some particular protected conduct that he had recently engaged in. Thus, the element of timing does not, in my view, serve to support the General Counsel’s theory of unlawful motivation on the part of the Respondent.

Counsel for the General Counsel further attempts to show a motivational link between Torres’ protected activity and the discipline that he received by establishing that he was treated in a disparate fashion. Regarding the Respondent’s discipline of Torres for tardiness, I have already concluded that the Respondent did not have a policy of granting a grace period for employees who arrived at work late by 7 or less minutes. I earlier listed a number of employees who were similarly disciplined. Therefore, the Respondent was in no way acting in a disparate or unusual manner when it disciplined Torres for tardiness, some of which occurrences were for 7 minutes or less.

In fact, the contrary appears to be true, with the Respondent treating Torres in a more lenient fashion than was necessary. As I noted above, Torres accrued sufficient unexcused absences and tardies over a 12 month period to have been terminated under the Respondent's attendance policy. As is reflected in the Employee Notification form that Torres received on February 4, 2011, he was disciplined with a verbal warning for 19 occurrences of tardiness from September 30, 2010, to February 4, 2011. (G.C. Ex. 5.) However, the Respondent's attendance policy provided for termination where an employee was late 12 times in a year's period. (Res. Ex. 1, p. 4, Attendance & Punctuality.) Further, as late as September 14, 2011, Torres was issued a written warning for 12 instances of tardiness, three of which were for 7 minutes or less, during a 12 month period. (G.C. Ex. 10.) Once again, under the Respondent's written Attendance & Punctuality policy he could have been terminated for so many occurrences, but was not. (Res. Ex. 1.) Certainly, the Respondent's decision not to terminate Torres for cause on several separate occasions constitutes significant evidence that he was not being singled out for discipline because of his protected activity.

Of further significance regarding the issue of motivation, there is no evidence of animus towards the Union on the part of the Respondent's managers and supervisors. The complaint contains no allegations, nor is there is any known history of unlawful statements made to union supporters by the Respondent's representatives as would show any hostility because of union activity. Although the parties' collective bargaining agreement had expired, the Hospital and the Union had, at the time of the hearing, been engaged in lengthy negotiations over the terms of a successor agreement, and to date there has been no finding by the Board of any bad faith or surface bargaining on the part of the Respondent regarding those negotiations.

Based on the above analysis and the record as a whole, I conclude that counsel for the General Counsel has failed to meet her burden of proof and establish a *prima facie* case that the Respondent was motivated, even in part, to discipline Torres because of his union and protected concerted activity. However, for the sake of completeness, even assuming, *arguendo*, that the General Counsel had met her burden of proof, I would conclude that the Respondent was able to establish that it would have taken the same disciplinary action against Torres absent the protected activity.

When the General Counsel meets the burden under *Wright Line*, it shifts the burden of proof to the Respondent to show that it would have taken the same action absent the protected conduct. *Senior Citizen Coordinating Counsel of Riverbay Community*, 330 NLRB 1100 (2000); *Regal Recycling, Inc.*, 329 NLRB 355 (1999). The Respondent must persuade by a preponderance of the evidence. *Peter Vitalie Company, Inc.*, 310 NLRB 865, 871 (1993). I am convinced that the Respondent has met this burden.

In viewing the evidence in its totality, I conclude that the Respondent had good cause to issue two written warnings to Torres on March 18, 2011, and to issue a written warning and a 24-work hour suspension to him on April 7, 2011. In these instances, he was disciplined for either excessive tardiness or excessive unexcused absences. For the reasons that I expressed in detail above, I am of the view that said discipline was justified under the Respondent's Attendance and Punctuality policy (Res. Ex. 1.), and it was not a pretext to punish Torres for his union and protected concerted activity. Thus, I conclude that even had the General Counsel established that the Respondent was motivated in part to discipline Torres because of his protected activity, the Respondent was able to show that it would have taken said action against Torres even in the absence of that protected activity.

Accordingly, based on the above, I hereby recommend to the Board that complaint paragraphs 17 and 20 be dismissed.

### **E. The Wearing of Union Stickers**

Complaint paragraphs 16, 19, and 21 allege that the Respondent's past practice has been to allow employees to wear union insignia while present in immediate patient care areas, a practice which the Respondent unilaterally ceased when on May 6, 2011, it instructed employees to remove union stickers that read, "Respect Our Work Stop Union Busting! We Support William Hooper NUHW." It is the General Counsel's contention that this conduct constituted a refusal to bargain in good faith, and interfered with, restrained and coerced employees in the exercise of their Section 7 rights. However, the Respondent contends that it merely barred one inflammatory sticker from being worn in immediate patient care areas, which was consistent with its past practice as embodied in its dress policy, and within its rights under the extant law.

For the most part, the facts regarding this issue are not in dispute. The Hospital has a dress policy entitled "Dress Standards and Hygiene," which was effective March 22, 1991, and last revised November 3, 2009. (Res. Ex. 11.) That policy provides that management has the authority to determine whether employees are appropriately groomed and dressed, and "reserve[s] the right to determine the appropriateness of employee appearance and attire." It further provides that buttons or emblems or pictures not related to the Hospital or USC are generally not allowed. Under the policy, the Hospital has the discretion to authorize exceptions to that rule "with prior management approval." (Res. Ex. 11, p.1, items 4 and 6.)

It is undisputed that the past practice of the Hospital has been to allow employees to wear NUHW insignia. Witnesses testified that employees have regularly worn buttons, lanyards, and other insignia from one of the collective bargaining representatives present at the Hospital. The unrebutted testimony was that continuing through the date of the hearing, employees regularly wore pins and other insignia that expressed their support for the NUHW. With the exception of the sticker in question, the Hospital has not been accused of objecting to any of the union insignias worn by members of the Unit.

William Hooper was an employee in the EVS Department and was a long time Union leader, shop steward, and part of the Union's bargaining committee. The Respondent terminated Hooper during the spring of 2011, and the Union filed an unfair labor practice charge over that termination. Subsequently, that charge was dismissed by Region 21 and its appeal was denied by the Office of the General Counsel.

As part of the Union's efforts to support Hooper, Union Organizer Sophia Mendoza began a sticker campaign. Mendoza testified that she prepared about 300 black and white stickers reading, "Respect our Work Stop Union Busting! We Support William Hooper NUHW." (G.C. Ex. 23.) Significantly, Mendoza acknowledged that she considered the term "Union Busting," as used on the sticker, to be a "derogatory" term.

According to Mendoza, she distributed about 200 stickers to two of the union stewards at the Hospital. The stickers contained an adhesive on the back, which would adhere to a garment worn by an employee. (G.C. Ex. 39.) Mendoza testified that she subsequently saw about 20 employees wearing the stickers during the nightshift and 50-100 employees wearing the stickers during the day shift. She saw unit employees wearing the stickers on their uniforms, either on the front or back, throughout the Hospital, including patient care areas.

EVS employee Melissa Lynch testified that on May 6, 2011, she placed one of the stickers on the small bag she wears around her neck while at work. According to Lynch, she was approached by Kevin Kaldjian, at the time the acting EVS Director, who allegedly told her



that he did not want her wearing the sticker within the facility and that she had to take the sticker off. She claims that he repeated several times that she could not wear the sticker at work and needed to take it off. Further, Lynch contends that Kaldjian never indicated that the sticker she was wearing was inflammatory, and that she thought that he was referring to all union stickers, which could no longer be worn at the Hospital. Lynch testified that she works inside the Hospital, including patients' rooms and areas where patients are being treated. Sometimes she works in those rooms while the patients are present.

Kaldjian testified that when he spoke with Lynch about wearing the Hooper sticker she was in the lower lever lobby, in her assigned work area. According to Kaldjian, there are several patient care areas in the immediate vicinity including the MRI and the main hallway where patients are transported into the Hospital from ambulances and outpatient clinics. He admits asking Lynch to "remove the sticker," and testified that she responded that he could not tell her that she was not permitted to wear a NUHW sticker. According to Kaldjian, he replied, "You're absolutely correct. You have all rights [sic] to wear a NUHW sticker. It's the inflammatory comment below it that I am asking you to remove it [sic] for." Kaldjian claims that Lynch continued to ask if she could wear a NUHW sticker. He testified that he responded, "Yes, you can, as long as it says I support NUHW, or I've seen some pins also that say I heart NUHW, and those are completely fine for you to wear."

At the conclusion of their conversation, Kaldjian contends that Lynch removed the sticker and threw it away. She was not disciplined in any manner for having worn the sticker. Since that date, he has seen Lynch and other EVS employees wearing NUHW insignia, but not the one that mentioned Hooper. However, Lynch testified that she did not remove the Hooper sticker until a week before the hearing.

To the extent that there are any disparities in the versions of the conversation between Lynch and Kaldjian, I credit Kaldjian. When testifying he seemed much more certain as to what was said and his version was more complete than that told by Lynch. Further, while Mendoza testified that other managers and supervisors also demanded that other unit employees remove the Hooper sticker, there are no such allegations in the complaint, and no other hospital employee so testified.

On May 11, 2011, Mendoza sent an email to Human Resources Manager Herberger and other representatives of the Hospital complaining about unit employees being required to remove stickers in support of the Union. (G.C. Ex. 40.) Mendoza testified that she was unaware that as of May 9, 2011, Herberger had sent her an email that explained the Respondent's decision to ask unit employees wearing the Hooper sticker to remove it. According to this email, "the Hospital does not prevent [unit] members from wearing union insignia while at work." However, the Hospital considered that the sticker in question was "designed to provoke controversy and cause dissension. As such, it would cause a disruption of health-care operations and disturb the tranquil environment [the Hospital's] seriously ill patients need and deserve." Accordingly, the Union should be advised that "any employees who wear these buttons in immediate patient care areas will be instructed to remove them and will be subject to discipline should they refuse to do so." (G.C. Ex. 41.) Apparently Herberger's email message was not received by Mendoza until somewhat latter, due to some confusion as to Mendoza's email address. In any event, the statement in the email remains the Respondent's stated position, that being that the Hospital considers the Hooper sticker to be provocative and inflammatory, and employees will not be permitted to wear it or similar insignia in immediate patient care areas of the facility. (G.C. Ex. 42.)

For the most part, the issue before me is one of law, not fact. It appears that the Hospital has a long history and past practice of allowing unit employees to wear various types of

union insignia, which indicate their membership in and support for the Union. However, the Respondent is of the belief that an exception can be made for what it considers to be inflammatory or provocative stickers or buttons, and that the wearing of such insignia can be prohibited to employees who have contact with the Hospital's patients. In the case of employee

5 Lynch, there is no question that she was told to remove the Hooper sticker, although it is somewhat unclear as to whether she actually did so. In any event, the General Counsel takes the position that the requirement by the Hospital's supervisor that Lynch remove the sticker constituted a unilateral change in the dress code established through past practice, and also an attempt to interfere with, restrain and coerce employees in the exercise of their Section 7 rights.

10 The Supreme Court has held that it is appropriate to permit hospitals special latitude to restrict union activity in patient-care areas since hospitals are facilities "where patients and relatives alike often are under emotional strain and worry, where pleasing and comforting patients are principal facets of the day's activity, and where the patient and his family –

15 irrespective of whether that patient and that family are labor or management oriented – need a restful, uncluttered, relaxing, and helpful atmosphere, rather than one remindful of the tensions of the marketplace in addition to the tensions of the sick bed." *NLRB v. Baptist Hospital, Inc.*, 442 U.S. 773, 783, fn.12 (1979) (quoting *Beth Israel Hospital v. NLRB* 437 U.S. 483, 509 (1978), concurring opinion). Still, the Court held that a rule prohibiting the wearing of union

20 insignia in non-patient care areas is presumptively invalid, absent a showing by the employer of "special circumstances," specifically that banning the wearing of insignia was "necessary to avoid disruption of health care operations or disturbance of patients." *Baptist Hospital* at 781.

25 Whether a rule regarding union buttons and insignia in the hospital setting is valid depends upon whether the rule is being applied to a patient care or non-patient care area of the facility. The Board has held that a hospital may prohibit the wearing of union insignia in "immediate patient care areas" and that a rule banning buttons in patient care areas is presumptively valid. *London Memorial Hospital*, 238 NLRB 704, 708 (1978). Also see *Casa San Miguel*, 320 NLRB 534, 540 (1995); *Washington State Nurses Association v. NLRB*, 526 F.3d 577, 580 (9<sup>th</sup> Cir. 2008).

30 In *Mesa Vista Hospital*, 280 NLRB 298, 299 (1986), the Board clearly delineated in a hospital setting the difference between the wearing of union insignia in a non-patient care area from that where patients are being cared for, as follows: "[E]mployees have the right to wear

35 union insignia even while at work. A hospital's prohibition of the wearing of insignia, however, on working and even on nonworking time in immediate patient care areas is presumptively valid. Outside of immediate patient care areas, and outside other areas where the hospital establishes an adverse effect on patient care, employees retain the right to wear union insignia while working. An employer may further restrict the right by demonstrating 'special circumstances.'"

40 In the matter before me, it has been the long past practice at the Hospital for the unit employees to wear union insignia throughout the facility, even in patient care areas. I conclude that the credible, probative evidence indicates that this practice has not changed. As I noted above, I credit supervisor Kaldjian's version of his conversation with EVS employee Melissa

45 Lynch. It is obvious to me that Kaldjian was concerned with the specific sticker that Lynch was wearing, which sticker referred to the term "Union Busting." This is a sensitive, highly derogatory term, and, in my view, could easily inflame the emotions of people who view it. In some circles, placing such a moniker on an individual or employer is considered a highly insulting and offensive remark.

50 No credible evidence was offered by the General Counsel as would establish that the Hospital has ever allowed its employees while at the facility to wear buttons, stickers, or insignia's with such an inflammatory message. Even so, Kaldjian credibly testified that he was

not prohibiting Lynch from wearing the specific sticker in question in non-patient care areas of the Hospital, but only in those areas where she would likely come into contact with patient's or their visitors.

5 I conclude that counsel for the General Counsel has failed to establish that the Respondent, by the statements of Kaldjian to Lynch on May 6, 2011, had changed its past practice of allowing employees to wear union insignia throughout the facility. There has been no refusal to bargain over this issue, as there has been no unilateral change by the Respondent in the past practice. Clearly, the language on the sticker in question is so offensive that its prohibition in immediate patient care areas is a legitimate exception to the parties well established past practice.

15 Regarding the issue of whether the Hospital, through Kaldjian's statement to Lynch, could lawfully prohibit the wearing of the sticker in question in immediate patient care areas, I believe the case law strongly indicates so. The Board and the courts have delineated a clear distinction in a health care facility between the right that employees have to wear union insignia while working in non-patient care areas, with the right that management has to limit the wearing of union insignia in immediate patient care areas. The testimony is uncontested that Lynch often works in patients' rooms or those areas where they are being treated, sometimes while they are present. Further, Kaldjian's testimony was un rebutted that the lower level lobby where he directed Lynch, who was working at the time, to remove the sticker is in the immediate vicinity of patient care areas such as the MRI and the hallway where patients enter and exit the Hospital.

25 As I stated, the term "Union Busting" on the sticker in question was highly inflammatory. Patients seeking or undergoing medical treatment and their concerned relatives and visitors who are often under considerable emotional strain and worry should not have to be reminded about, or needlessly involved in, labor-management disputes between the Union and the Hospital. *NLRB v. Baptist Hospital, Inc., supra*. The Hospital may legally restrict the wearing of union propaganda in immediate patient care areas. See *Casa San Miguel*, 320 NLRB 534, 540 (1995); Also see *Washington State Nurses Association v. NLRB, supra*; *Mesa Vista Hospital, supra*; *London Memorial Hospital, supra*. Such is even more clearly the case where the sticker being worn is as highly inflammatory and divisive as the one worn by Lynch.

35 Therefore, I conclude that Kaldjian's comments to Lynch on May 6, 2011, that she must remove the sticker that she was wearing while working in immediate patient care areas of the Hospital, were neither a unlawful unilateral change in the parties' past practice, nor did they constitute an attempt to interfere with, restrain or coerce unit employees in the exercise of their Section 7 activity. Accordingly, I hereby recommend to the Board that complaint paragraphs 16, 19, as it relates to 16, and 21 be dismissed.

### Conclusions of Law

45 1. The Respondent, USC University Hospital, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

50 2. The Union, National Union of Healthcare Workers, herein called NUHW, is a labor organization within the meaning of Section 2(5) of the Act.

3. Service Employees International Union, United Healthcare Workers-West, herein called SEIU, is a labor organization within the meaning of Section 2(5) of the Act.

4. The Union is the exclusive collective bargaining representative of the following unit of employees (the Unit), which Unit is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act: All full-time, regular part-time and per diem service, maintenance, technical and skilled maintenance employees employed by the Respondent at its facility located at 1500 San Pedro Street, Los Angeles, California; excluding all other employees, managers, supervisors, confidential employees, guards, physicians, residents, central business office employees (whether facility-based or not) who are solely engaged in qualifying or collection activities, employees of outside registries and other agencies supplying labor to the Employer and already-represented employees.

5. On June 17, 2010, the Union was certified as the exclusive collective bargaining representative of the employees in the Unit.

6. At all times since June 17, 2010, the Union, based on Section 9(a) of the Act, has been the exclusive collective bargaining representative of the unit employees.

7. By the following acts and conduct the Respondent has violated Section 8(a)(1) and (5) of the Act:

(a) Making unilateral changes in its employees' terms and conditions of employment since on or about October 2010, by eliminating the Extra Shift Bonuses paid to the pulmonary function technicians and the OR gas lab technician who are called back to work from the On Call Schedule;

(b) Making unilateral changes in its employees' terms and conditions of employment since on or about February 1, 2011, by eliminating the mandatory OR Blood Gas Lab On Call Schedule for the pulmonary function technicians and the OR gas lab technician; and

(c) Making unilateral changes in its employees' terms and conditions of employment since on or about January 2, 2011, by changing the schedule for the echo technicians from a 3-day a week, 12-hour a day schedule to a 5-day a week, 8-hour a day schedule.

(8) The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

(9) The Respondent has not violated the Act except as set forth above.

### **Remedy**

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.<sup>10</sup>

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<sup>10</sup> Both in the complaint and in her post-hearing brief, counsel for the General Counsel requests as part of the proposed remedy that the certification year be extended by 6 months so as to give the Union additional time to reach a collective bargaining agreement with the Respondent, and also that the notice be read to assembled employees. However, in my view, such an extraordinary remedy is neither necessary nor appropriate in this case in order to effectuate the policies of the Act.

No evidence was offered by the General Counsel as would establish a general failure to bargain in good faith on the part of the Respondent. Further, no evidence was offered as would establish that the Respondent harbored animus towards the Union. While every finding of an unfair labor practice is significant, those unlawful unilateral changes committed by the

Continued

Having found that the Respondent violated the Act by making certain unlawful unilateral changes in the terms and conditions of employment of unit employees, I shall recommend that the Respondent be ordered to, at the request of the Union, rescind any and all of those changes. These include the elimination of the Extra Shift Bonuses paid to pulmonary function technicians and the OR gas lab technician who are called back to work from the On Call Schedule; the elimination of the mandatory OR Blood Gas Lab On Call Schedule for the pulmonary function technicians and the OR gas lab technician; and changing the schedule for the echo technicians from a 3-day a week, 12-hour a day schedule to a 5-day a week, 8-hour a day schedule.

My recommended order further requires that the Respondent make whole for any loss of earnings any unit employees who were discriminated against as a result of the Respondent's unilateral actions. Backpay shall be computed in accordance with *F.W. Woolworth, Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizon for the Retarded*, 283 NLRB 1173 (1987), plus daily compound interest as prescribed in *Kentucky River Medical Center*, 365 NLRB No. 8 (2010), enf. denied on other grounds sub. nom., *Jackson Hospital Corp., v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011).

The Respondent shall be required to post a notice that assures its employees that it will respect their rights under the Act. In addition to physically posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. *J. Picini Flooring*, 356 NLRB No. 8 (Oct. 22, 2010).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>11</sup>

### ORDER

The Respondent, USC University Hospital, its officers, agents, successors, and assigns, shall

#### 1. Cease and desist from:

(a) Making unilateral changes in its employees' terms and conditions of employment by eliminating the Extra Shift Bonuses paid to the pulmonary function technicians and the OR gas lab technician who are called back to work from the On Call Schedule;

(b) Making unilateral changes in its employees' terms and conditions of employment by eliminating the mandatory OR Blood Gas Lab On Call Schedule for the pulmonary function

Respondent in this case were distinct and limited. They affected a rather small number out of the total number of employees who are members of the bargaining unit. There is simply no evidence that the Respondent's unfair labor practices had any impact on the parties' ongoing contract negotiations. Under such circumstances, a traditional Board remedy is certainly adequate. See *Spurlino Materials*, 353 NLRB No. 125, slip op. at p. 4 (2009).

<sup>11</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

technicians and the OR gas lab technician;

(c) Making unilateral changes in its employees' terms and conditions of employment by changing the schedule for the echo technicians from a 3-day a week, 12-hour a day schedule to a 5-day a week, 8-hour a day schedule; and

(d) In any like or related manner, interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) At the request of the Union, the Respondent shall rescind the unilateral change made in its employees' terms and conditions of employment implemented on or about October 2010, which change eliminated the Extra Shift Bonuses paid to the pulmonary function technicians and the OR gas lab technician who are called back to work from the On Call Schedule;

(b) At the request of the Union, the Respondent shall rescind the unilateral change made in its employees' terms and conditions of employment implemented on or about February 1, 2011, which change eliminated the mandatory OR Blood Gas Lab On Call Schedule for the pulmonary function technicians and the OR gas lab technician;

(c) At the request of the Union, the Respondent shall rescind the unilateral change made in its employees' terms and conditions of employment implemented on or about January 2, 2011, which changed the schedule for the echo technicians from a 3-day a week, 12-hour a day schedule to a 5-day a week, 8-hour a day schedule;

(d) Make whole for any loss of earnings those unit employees who were discriminated against as a result of the Respondent's unilateral actions, in the manner set forth in the remedy section of this decision;

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order;

(f) Within 14 days after service by the Region, post at its hospital facility in Los Angeles, California copies of the attached notice marked "Appendix."<sup>12</sup> Copies of the notice, on forms provided by the Regional Director for Region 21 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent

<sup>12</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

at any time since October 2010; and

5 (g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

**IT IS FURTHER ORDERED** that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

10 Dated: Washington, D.C., April 11, 2012.



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Gregory Z. Meyerson  
Administrative Law Judge

## APPENDIX

### NOTICE TO EMPLOYEES

Posted by Order of the  
National Labor Relations Board  
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union  
Choose representatives to bargain with us on your behalf  
Act together with other employees for your benefit and protection  
Choose not to engage in any of these protected activities

WE WILL NOT do anything that interferes with these rights. Specifically:

WE WILL NOT unilaterally change your terms and conditions of employment without giving prior notice to the National Union of Healthcare Workers (the NUHW), and without affording the NUHW an opportunity to bargain about any such changes, in the following bargaining unit represented by the NUHW: "Included: All full-time, regular part-time and per diem service, maintenance, technical and skilled maintenance employees employed by the Employer at its facility located at 1500 San Pedro Street, Los Angeles, California; excluded: All other employees, managers, supervisors, confidential employees, guards, physicians, residents, central business employees (whether facility-based or not) who are solely engaged in qualifying or collection activities, employees of outside registries and other agencies supplying labor to the Employer and already represented employees."

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by the National Labor Relations Act.

WE WILL, at the request of the NUHW, rescind the unilateral change made in your terms and conditions of employment on or about October 2010, which change eliminated the Extra Shift Bonuses paid to the pulmonary function technicians and the OR gas lab technician who are called back to work from the On Call Schedule.

WE WILL, at the request of the NUHW, rescind the unilateral change made in your terms and conditions of employment on or about February 1, 2011, which change eliminated the mandatory OR Blood Gas Lab On Call Schedule for the pulmonary function technicians and the OR gas lab technician.

WE WILL, at the request of the NUHW, rescind the unilateral change made in your terms and conditions of employment on or about January 2, 2011, which changed the schedule for the echo technicians from a 3-day a week, 12-hour a day schedule to a 5-day a week, 8-hour a day schedule.



WE WILL make whole for any loss of earnings, plus interest, compounded on a daily basis, those employees who were discriminated against as a result of our unilateral actions.

\_\_\_\_\_  
USC University Hospital

(Employer)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: [www.nlrb.gov](http://www.nlrb.gov).

888 South Figueroa Street, 9th Floor

Los Angeles, California 90017-5449

Hours: 8:30 a.m. to 5 p.m.

213-894-5200.

**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 213-894-5229.